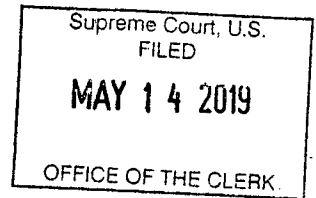


18-9537
No. _____



IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN S. HENRY — PETITIONER

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

STEPHEN HENRY # 52075-280

P.O. BOX 1010

BASTROP, TX 78602

ORIGINAL

QUESTION(S) PRESENTED

1. On the basis of a § 2254, a claim of fraud upon the court will have been reviewed by state courts prior to the Federal District Court level. However, a claim of fraud from a § 2255 habeas proceeding has not had any prior review. If it is alleged that the Assistant United States Attorney has committed fraud during a § 2255 habeas proceeding, is it an attack on the previous "resolution on the merits" to review the transcripts of the § 2255 hearing and use the true merits as evidence to prove the fraud?
2. The focus of a Rule 60 (d)(3) motion for fraud upon the Court is to expose fraud and return to the true merits of the case. If the Assistant United States Attorney makes a blanket statement, "All evidence in this case was legally obtained" and that statement is materially false, can unadjudicated facts, required to prove the statement false, be brought before the court without being said to raise a "new claim" ?
3. Under the Fifth Amendment, should a Rule 60 (d)(3) Fraud upon the Court motion, filed by a sex offender, be held to a different standard of Law as compared to other criminal defendants?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF AUTHORITIES CITED

CASES

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United Student Air Funds v. Espinoza, 559 U.S. 260, 271, 176 L.Ed. 2d 158	12
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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix 1 - 6 to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix 7-9 to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was August 06, 2018.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 28, 2019, and a copy of the order denying rehearing appears at Appendix 1-2.

(Petition for REHEARING EN BANC DENIED)

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: " No person shall be... deprived of life, liberty, or property , without due process of law"

The Fourth Amendment to the United States Constitution provides, in pertinent part: " The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

STATEMENT OF THE CASE

The merits of my ineffective assistance of counsel claim are what won me a § 2255 evidentiary hearing. The manner in which trial counsel was ineffective is not the matter at hand in this petition, but the fraud upon the Court. The matter that has been brought before the Court was brought by a Rule 60 (d)(3) motion. What is presented here is the claim of fraud and the improper dismissal of a Rule 60 (d)(3) motion.

I, Stephen S. Henry # 52075-280, pled guilty to production of obscene visual representations of children and possession of child pornography and was sentenced to 240 months of imprisonment. I filed an unsuccessful 28 U.S.C. § 2255 motion due to ineffective assistance of counsel. Due to events that occurred during the Habeas proceedings I filed a Rule 60 (d)(3) motion for fraud upon the Court. This is where and why this matter begins. The substance of my Rule 60 (d)(3) is the fraud, and the evidence of the fraud is found in the contrast between the true merits and the fabricated merits which the Court ruled on. After all the thrust of a Rule 60 (d)(3) Fraud claim is to dispose of the fake facts and return to the true merits of the case.

Nothing fair or equitable can come from " Just answer yes or no. Ms. Thompson will have an opportunity to explain anything that needs to be explained for the record. And it'll just go easier that way" (Appx. 15-16) This is what was instructed by the magistrate. This is the base of my argument. When the Assistant United States Attorney (AUSA), Ms. Thompson, took her opportunity to explain things for the record, she did so in an egregious manner. The AUSA suborned perjury, use materially false statements, fabricated testimony, and supported a Napue violation.

Though lengthy and dull, here are some of the acts of fraud in a nutshell and how the fraud scheme influence the Court.

1) SHOWING AN OFFICER EVIDENCE

In the closing arguments (Appx. 23) the AUSA wrote "Upon arrival officer Davidson was led into the house and shown the binder". I assert to this Court that this is a materially false statement. Not only is this a fabricated statement but the AUSA knew that it was false. The only way to prove that this statement was false is to review the true merits of the case as support for this contention.

When asking about the binder in question and the witness's interaction with the officer AUSA Thompson ask " And what, if anything, did you tell her?" Padgett, the witness, answered:

"I told her I found a binder, that it was in the bedroom and I didn't know what it was. Then I went outside. And that is when she came out and she told me that it was a federal offense and she was going to call detective McGuire out because it was child pornography"

(Appx. 17-18)

According to the witness this is what occurred upon the arrival of officer Davidson. When the witness was directly asked who she showed the binder to, the answer was clear. "I showed it to my mother, to Erin, to Chris, and to Crystal" (Appx. 14)

The AUSA was clear that this was the statement as she asked "Ms. Padgett, when you brought the binder out and showed it to your family and friends you testified that a decision was made to call the police?" and Padgett responded "Yes". This was the only time prior to both officers being at the home that Padgett says she shows the binder. (Appx. 17)

2) CLARIFYING WHEN THE BINDER WAS SHOWN

The testimony at the hearing makes it clear when the binder was shown to the officers. The AUSA ask the officer, "And at some point she shows you the binder?". The officer answered "Yes". The AUSA then ask, "What does she say about the binder as your looking at it?". What follows is a detailed conversation about who was thought to be in the pictures and who was discovered to be in the pictures, to include specific names. (Appx. 12-13) However it must be noted here that the AUSA says "at some point" and no specific time is given. But the specific time is given by the other witnesses. When Padgett was asked about this conversation, the same information about that conversation is given, two witnesses testify to the same conversation. Padgett was able to include a time reference though. The AUSA ask, "And this is before Corporal McGuire's called out?". Padgett then clearly responded, "No, I identified Tamara when Detective McGuire was there because I had pull up the FACE BOOK page". (Appx. 19) AUSA Thompson also asked the detective about a conversation with Padgett about pictures in the binder and that discussion was the same as the prior two witnesses and all three agree on the time frame of that discussion. Thompson ask the detective "When did that happen?" and he responded,

"That actually happened after I looked in the binder and we were dicussing searching the house. She kept saying ' I know her ', talking about one of the girls in the image - one of the girls in the images in the binder" (Appx. 04)

Three witnesses all agree on the nature of the conversation when Padgett "Shows" the binder to the officers. Two witnesses pin point the time of that showing to after the detective's arrival. Remember that Davidson had to call McGuire out to the scene and after he arrives Padgett is with him and the binder.

The transcripts reflect the witness testimony and are the true merits of the case. But the AUSA puts into the record, with the enhanced credibility of an officer of the Court, "Upon arrival officer davidson was led into the house and shown the binder". (Appx. 22) When the actual testimony is reviewed this is absolutely false statement but it is what the Court determined as the "merits" of the case, "Padgett gave consent by inviting her into the house and showing her the binder". (Appx. 24)

3) THE ASSISTANT UNITED STATES ATTORNEY SUBORNS PERJURY

In order to have Padgett in the house to "show" the officer the binder upon her arrival, Thompson needed to place Padgett -- in the house. this is the only way that the scheme used would work.

In Padgett's affidavit of July 15, 2011, Padgett clearly stated, "I asked officer Davidson to go into the house to obtain and review the binder, I stayed outside". (Appx. 20) In the hearing Padgett was asked by Thompson, "When officer Davidson got there where were you". Padgett answers, " When she first arrived, I believe I was outside". (Appx. 17) This consistent answer did not fit the narrative of the government so, as if to cue the witness, the AUSA ask, "When you say, ' We brought her inside the house ". Padgett answers, " That would be I was in the bedroom with my Brother, we were packing up my son's bedroom and she knocked on the door and Crystal was already at the door. I went to the door and met her at the door and we brought her into the bedroom." (Appx. 18) This is the point were the AUSA set up her scheme to have Padgett "in the house". The previous written affidavit of the witness and then the prior testimony do not match this statement given once prompted by the AUSA.

4) THE ASSISTANT UNITED STATES ATTORNEY FABRICATES WITNESS TESTIMONY.

It has been discussed that Padgett "told" the officer about the binder, but had shown the binder to family and friends. However, using the enhanced influence of an officer of the Court, the AUSA interjected the fabricated "fact" that Padgett "showed" the binder to the officer upon the officers arrival in her questions. This was not a concept entered to the record by any witness but an occurrence fabricated by the AUSA and entered into the Judicial process by the AUSA alone. Padgett had just stated that she told the officer about the binder and went outside. The follow up question to Padgett telling the officer about the binder was, "And when you show her the binder, do you give her information about whose binder it is?". It is this question that interjects Padgett showing the binder to the officer. But the testimony of the witnesses could not be more clear, Padgett was with the officers showing the binder after the detective's arrival not before.

*

This Court has held in *Napue v. Illinois*, 360 U.S. 264, 1269, 79 S. Ct. 1123, 3 L. Ed. 2d 1217 (1959) that prohibition against false testimony is implicit in any concept of ordered liberty". In the closing arguments the AUSA made this blanket statement: "more importantly, the (sic)all of the evidence in this case was legally obtained." (Appx. 23) I assert that this is a materially false statement and I am required to show why this is a false statement. To prove my assertion I must look to facts that were not adjudicated at my \$ 2255 hearing. I am not making a "new claim" but simply supporting the fact that this false statement is improperly influencing the Court making it seem that all evidence was legally obtained, corrupting the

truth seeking process. It has been held by this Court that a false statement becomes material when it results in "a corruption of the truth-seeking function of the trial process" (United States v. Agurs 427 U.S. 97, 104, 96 S.Ct. 2392, 2397, 49 L. Ed. 342 (1967)) The burden would then fall on the evidence to show that this was a false statement.

The true merits of the case, and the unadjudicated facts, show that digital media, obtained by Padgett's consent, was searched prior to obtaining a warrant. Walter v. United States 447 U.S. 649, 65 L. Ed. 2d 410, 100 S.Ct. 2395 (1980) is clear that "an officer's authority to possess a package is distinct from his authority to examine its contents". The detective did not have authority to open any digital media without a proper warrant, but he did so anyway. (Appx. 25) The AUSA had the legal and moral duty to not intentionally mislead the Court, but did so by her silence on this matter and her materially false statement.

While the § 2255 hearing established that Padgett gave valid and timely consent for the officers to enter the home, it was not determined that the officers had authority to search items that Padgett did not have authority to or denied authority to. This Court has held that one person cannot waive another person's rights. "A search without a warrant presumptively violates the right of privacy of the victim. The theory of the consent exception is that a person may waive a constitutional right. How then can one person waive another's constitutional rights? If the Fourth Amendment protects people and not simply areas against unreasonable searches and seizures" (Katz v. United States, 389 U.S. 347, 353, 88 S.Ct. 507, 12, 19 L. Ed. 2d 576 (1967)). Further in Stoner v. California, 376 U.S. 483,

489, 84 S.Ct. 88 11 L. Ed. 2d 856, it is held that, "Third person consent, no matter how voluntarily and unambiguously given, cannot validate a warrantless search when the circumstances provide no basis for a reasonable belief that shared or exclusive authority to permit inspection exists in the third person from any source".

Padgett was clear that when she told the officer about the binder that she said, "I told her it was my husbands, the binder, it was in the garage -- it was in the corner of the garage he didn't want me to touch..." (Appx. 18) Padgett had no Authority to consent to the binder and she made that clear. The Detective was clear in his affidavit that the digital media he obtained was the solely my property. (Appx. 25) As such I was the only one with constitutional authority to permit inspection without a warrant. These are just two portions of the many unlawful acts that occurred. They are all detailed in my Rule 60 (d)(3) motion to show that the AUSA's statement of "all evidence in this case was legally obtained" is completely false, and how that statement blocked any defense because of portraying a private search revealed to the police that never really happened.

*

With these factors in mind, and having been denied my § 2255, and no certificate of appealability (C.O.A.) issued, I filed a Rule 60 (d)(3) motion. This motion contained far more detail on this matter than can be allowed here. This motion was dismissed without prejudice for lack of jurisdiction as it was construed as a successive § 2255 motion. Judge Garcia cited 28 U.S.C. § 2244(a)(3)(A) and United States v. Hernandez

708 f.3d 680, 681-82 (5th Cir. 2013). (Appx. 09) He held that I was re-asserting a § 2255 claim on the merits or presenting a new claim. He also denied a motion for reconsideration and application for a C.O.A. as well for the same reasons. (Appx. 8- 9) I assert to this Court that this was an improper dismissal!

Then the Appeals Court also denied my Rule 60(d)(3) appeal. The panel held that "the crux of his argument is the district Courts decision to deny him relief on the merits in the prior § 2255 proceeding was erroneous in light of the evidence presented at the evidentiary hearing". (Appx. 5-6) I was again denied when I filed my motion for reconsideration. The Appeals Court held, "Specifically, Henry has not shown that the AUSA's characterization of the evidence during the hearing constituted an unconcionable plan or scheme designed to improperly influence the Court", and that I must "show how the AUSA's actions during the hearing precluded the district Court from performing its impartial task of resolving the issues that were presented to it".(Appx. 3-4) These rulings are not consistent with other Rulings of the two Courts or with the past rulings of the Supreme Court.

These are the bases of the facts to be put before this Court for the consideration of the questions presented. These few facts of a much more detailed case are also very important to the arguments presented before the Court by this petition.

REASONS FOR GRANTING THE PETITION

There is a growing question of legal importance in today's social climate. A climate where a mere accusation of sexual misconduct causes the rule of law to be ignored and a person is considered guilty before any evidence is put before a Court of law. "While the underlying conviction of the appellant may trigger deep-seated prejudices in some people, the Judiciary must rise above these prejudices and insure appellant's due process right to a fair and impartial tribunal for both civil and criminal cases". (Marshall v. Jerrico Inc., 446 U.S. 238, 242, 64 L.Ed. 2d 182 (1980)) There is no fair and impartial hearing when a judge instructs a witness, "Just answer yes or no. Ms. Thompson will have an opportunity to explain anything that needs to be explained for the record. And it'll just go easier that way" (Appx. 15-16)

The Assistant United States Attorney (AUSA), Ms. Thompson, took her opportunity and made up her own story, contradicting witness testimony and facts on the record, and entered her own details into the record. "The enhanced credibility of the officer of the Court presenting the fraudulent materials has a substantially greater chance of influencing the Court's decision and the fraudulent materials entry into the decision process makes it impossible to determine the judgment was made in a manner consistent with due process of law". (United Students Air Funds v. Espinosa, 559 U.S. 260, 271, 176 L. Ed. 2d 158) The Court had no problem repeating the fake facts as the "merits" of the case. So it is impossible to determine that the judgement was made consistent with due process of law.

When the fraud was challenged, the district Court took a far departure from the accepted course of judicial proceedings and the appellet Court not only supported those action but did the same thing, avoiding the fraud. Not only were the decisions erroneous, they also conflict greatly with the previous decisions of this Court.

A great matter of importance in this case is the application of *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005). In footnote three, the late Justice Scalia limited the *Gonzalez* case to consideration of § 2254 cases. § 2254 cases have already been through the oversight of higher state courts and subjected to multiple stages of scrutiny prior to reaching a Federal District Court. A § 2255 fraud claim has not been through that level of scrutiny but starts right back in the Court where the Fraud was committed and no lower Court has reviewed the claim beforehand. As such, the exercise of this Court's supervisory power is warranted and requested in the following matters.

*

I. THE DISTRICT COURT

Judge Garcia was very clear in *Bell v. O'Brien* 2014, U.S. DIST. Lexis 190348 that a Rule 60 (d)(3) motion must show, in part, " A meritorious claim in the underlying case" and " Fraud, Accident, or mistake that prevented the party from obtaining the benifit of their claim". But I was dismissed for the very reason of showing a meritorious claim and the fraud that prevented me from obtaining the benifit of that claim. *Twining v. New Jersey*, 211 U.S. 78 , 101, 53 L. Ed. 2d 97, 107, 29 S.Ct. 14) holds that, " No change in ancient procedure can be made which

disregards those fundamental principles, to be ascertained from time to time by Judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of the Government." The district court was in error to dismiss my Rule 60 (d)(3). My dismissal was attributed to 28 U.S.C. § 2244 (a)(3)(A) (Appx. 09) and yet no such statute exists.

Also in my dismissal Judge Garcia relied on United States v. Hernandez, 708 F.3d 680, 681-82 (5th Cir. 2013) (Appx. 09) but the application of this case to mine was in error.

- 1) Footnote one in Hernandez states "Gonzalez does not post a bright-line principal that a Rule 60 (b)(6) motion is always or never a successive habeas petition" ... "Therefore we do not establish such a brite-line principle, but only analyze this particular rule 60 (b) motion"
 - a) That ruling was particular to that case and the analysis was for that particular case
 - b) Hernandez relies on Gonzalez which, as discussed was limited to the application of §2254 cases and should not be applied to a § 2255 case without direction from this Court.
- 2) Footnote two of Hernandez makes it clear that Hernandez's claims had no legal merit, were refuted by the record, were conclusory and he was not entitled to relief.

In my case, my claims do have merit and are so well supported by the record that the AUSA had to change the facts with fabrications to fit the narrative of the Government and improperly influenced the Court.

Even if Gonzalez v. Crosby 545 U.S. 524, 530 (2005) should apply, a "claim on the merits", for which I was dismissed, is clarified in footnotes four and five of that opinion. It is noted that attacking a movant's own conduct or Habeas counsel's omissions are asking for a second chance on the merits, but, asserting a previous ruling was in error for fraud is not a "claim on the merits" as it attacks defects in the Habeas proceedings integrity. Since I attacked the fraud the application of a "claim on the merits" is in error.

II. THE FIFTH CIRCUIT

1) In *Fackelman v. Bell*, 564 F.2d 734, 735-36 (5th Cir. 1977) the Fifth circuit holds that a Rule 60 Fraud motion's purpose is to "attack false facts and to return to the true merits of the case". In my case, Judge Southwick stated, "The crux of his argument is the district Courts decision to deny him relief on the merits in the prior 2255 proceeding was erroneous in light of the evidence presented at the evidentiary hearing" (Appx. 06) Yes, the false facts were entered into the record and I want to attack those facts and return to the true merits of the case. According to *Fackelman v. Bell* that is a true Rule 60 Fraud claim. But this standard was not upheld and I was denied.

2) I filed a motion for reconsideration and the same treatment continued. It was said I:

"Must show how the AUSA's actions during the hearing precluded the district Court from performing its impartial task of resolving the issues that were presented to it.

Specifically, Henry has not shown that the AUSA's characterization of the evidence during the hearing constituted an unconcionable plan or scheme designed to improperly influence the Court". (Appx. 3-4)

In *Turner v. Pleasant* 663 f.3d 770, 2011 U.S. App. Lexis 23647 No. 11-30129, A member of the panel, Judge Southwick, was clear that the Fifth circuit requires only a plausible allegation of fraud, and, that alledged facts that make it plausible that the district court did not perform its task in the expected manner constitutes a reversal of a district Court's dismissal or a Rule 60 motion. Further, in *Gonzalez v. Crosby*, Justice Souter joined Justice Stevens in holding that the probable merit of the movant's underlying claim

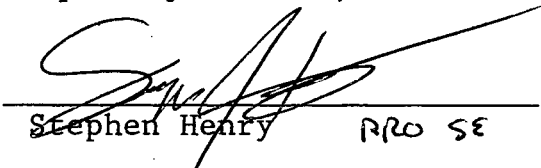
should be considered in a Rule 60 motion for fraud. But, here in my case, the Court has required me to SHOW the fraud to be granted review. This is a much higher standard and conflicts with that of a "plausible allegation". I clearly presented alledged facts that make it plausible that the district Court did not provide a fair and impartial hearing, but that did not constitute a reversal even with showing that the Court quoted the fabricated statements in its decision. This is clearly a standard that conflicts.

If a Assistant United States Attorney can "explain things for the record" and, though contradicting witness testimony, have that explanation become the "meritorious facts" because the Court directed a witness to let the AUSA explain the details, then the right to a fair and impartial hearing is just an illusion. And if the fraud is attacked but shielded by the Courts because the true merits of the case must be revisited to prove the fraud, then there is no justice for all and one's liberty is at the whim of whatever an officer of the Court wants to fabricate. This should not be allowed in our justice system and this Courts supervisory powers are all that is left to uphold the integrity of the Courts. I have made the assertion of fraud, provided a plausible allegation of how it occurred, and have made the request for the one fair shot at correcting the fraud that is allowed by a Rule 60 (d)(3) fraud hearing. But, because of the erroneous application of law and the conflicting rulings of these lower Courts, I have been denied that fair shot.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Stephen Henry PRO SE

Date: MAY 13, 2019